INTERNATIONAL

ARBITRATIONS AND AWARDS.

BY

GEORGE TICKNOR CURTIS.

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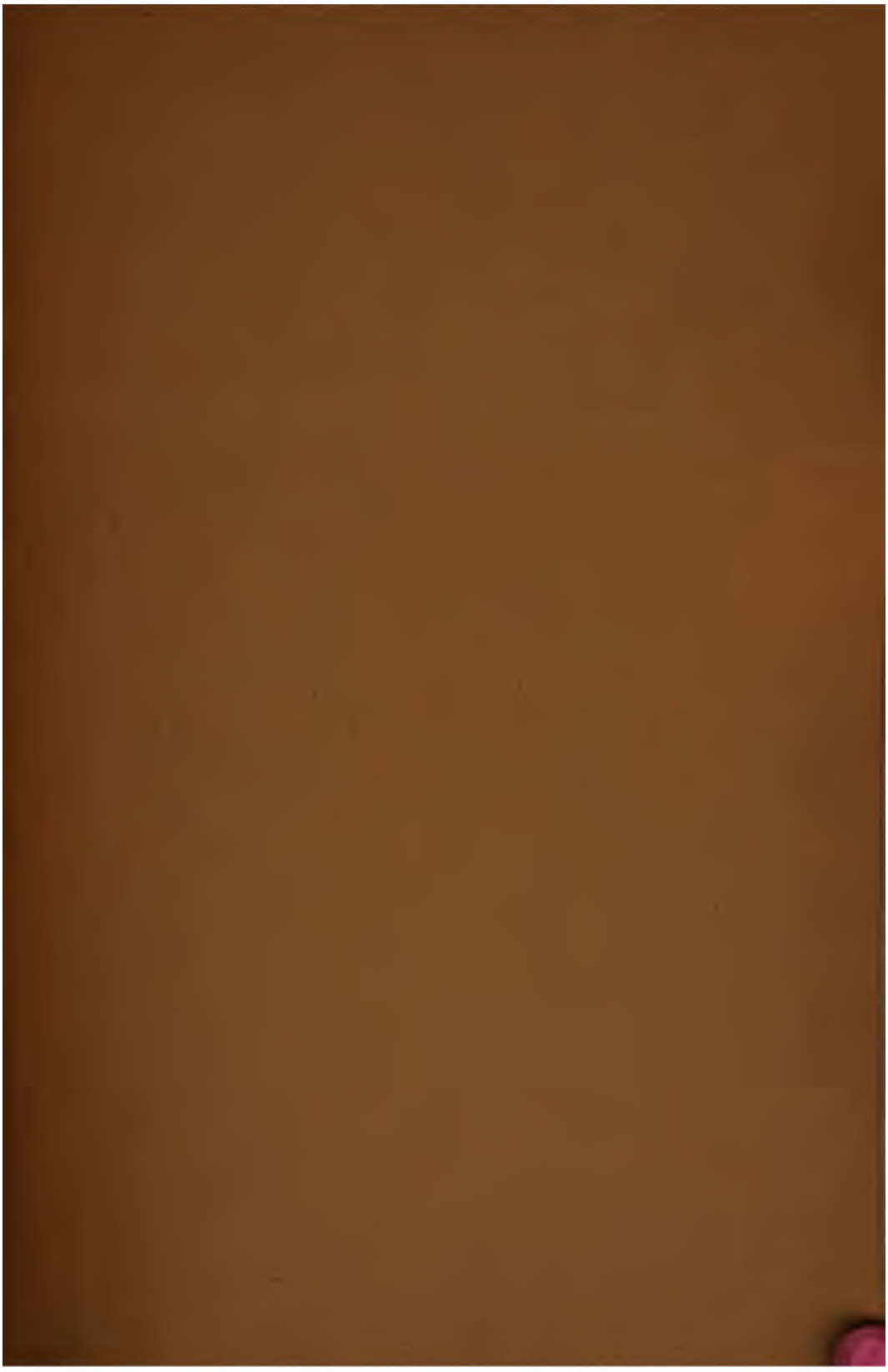

on the 20th of July, 1882, and as yet not finally acted on, although it has been several times discussed by that body. It is remarkable how a matter of no intrinsic importance in itself, and even ridiculously insignificant in comparison with the principles involved in it, may sometimes bring about the hazard of a great public mischief. To such a case it is now proposed to direct public attention. But before its facts are explained it may be well to give a brief sketch of the most important treaties of this description, from the earliest down to the most recent.

One feature has been common to most of these treaties and conventions. Most of them have contained, in language but little varied, and often in the very same terms, a clause or clauses stipulating and providing for the final and conclusive character of the awards that were to be made. The final and conclusive character of an adjudication by a tribunal to which the parties have voluntarily resorted would, without having an express covenant to that end embraced in the terms of the submission, be implied from the fact that the parties have agreed to refer a controverted claim to a selected tribunal, specially constituted to hear and decide it, and therefore made a tribunal of exclusive jurisdiction. But following the analogy and custom in private arbitrations, and because in arbitrations between governments it is fit that the honor of the parties should be distinctly pledged by the terms of the submission to abide by and carry out the decisions—since they can have no other sanction, and cannot be enforced by the judicial tribunals of either country—our State Department has long been in the habit of inserting, with the full concurrence of the governments with which we have made such treaties, a clause which has hitherto invariably operated to insure the acceptance and performance of whatever awards have been made. In other words, by the use of appropriate

stipulations the awards of such international courts of arbitration have been made to bear the same character as the judgments of municipal tribunals, with the additional force, however, that the parties, who are nothing less than sovereigns, responsible to no third power for their conduct, have made themselves responsible to each other for a faithful, upright, and honorable performance of whatever the adjudication calls for, that was within the scope of the submission. There can be no question that the peace of the world and the relations of friendly nations are deeply concerned in this system. Civilization has demanded and civilization has produced it. Anything which tends to impair it, or to jeopardize or obstruct its operation, is to be deprecated and resisted. That the United States should do anything, or allow anything to be done, that will lessen its value or discourage the practice of resorting to it, would be a national misfortune and disgrace.

The long line of precedents which are here to be sketched begins in 1795, when we made a treaty with Spain, which contained in its Article XXI. the following stipulation:

"In order to terminate all differences on account of the losses sustained by citizens of the United States in consequence of their vessels and cargoes having been taken by the subjects of His Catholic Majesty during the late war between Spain and France, it is agreed that all such cases shall be referred to the final decision of Commissioners to be appointed in the following manner. * * * The award of the said Commissioners, or any two of them, shall be final and conclusive, both as to the justice of the claim and the amount of the sum to be paid to the claimants; and His Catholic Majesty undertakes to cause the same to be paid in specie, without deduction, at such times and places as shall be awarded by the said Commissioners."

It was at this point, therefore, ninety years ago, that the stipulation for the binding, final and conclusive force of such awards first came into our diplomatic history; and from that day to this it has been repeated over and over again. In

fact, there is no formula in our diplomatic records of a more fixed character, or one that has been oftener resorted to in order to effect something that was never afterward to be called in question.

In 1802 the United States made another treaty with Spain, which, there being claims on both sides, declared as follows:

"His Catholic Majesty and the Government of the United States of America wishing amicably to adjust the claims which have arisen from the excesses committed during the late war by individuals of either hation . . . have agreed as follows: [Five Commissioners to examine, discuss, and decide the claims, which they are to judge according to the laws of nations and the existing treaty, and with the impartiality justice may dictate:] . . . From the decisions of the Commissioners there shall be no appeal; and the agreement of three of them shall have full force and effect as their decision, as well with respect to the justice of the claims, as to the amount of the indemnification which may be adjudged to the claimants; the said contracting parties obliging themselves to satisfy the said awards in specie, without deduction, at the times and places which may be expressed by the Board of Commissioners."

One other treaty with Spain, that by which we acquired Florida in 1819, remains to be noticed. In this case citizens of the United States asserted claims against Spain. The United States agreed to constitute an impartial commission to decide upon the claims, and to pay the amounts awarded, not exceeding in the whole $5,000,000 out of the purchase money which they agreed to give for the territory ceded. The commissioners were to "receive, examine and *decide upon* the amounts and validity of all claims included within the descriptions mentioned in the 9th article;" namely, all claims for damages and injuries which the United States or its citizens had suffered from Spain. This treaty omitted the clause expressly binding the parties to recognize the final and conclusive character of the awards. But the Supreme Court of the United States, speaking through Mr. Justice Story, said of it:

"Their [the Commissioners'] decision within the scope of this treaty is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not re-examinable. The parties must abide by it as the decree of a competent tribunal of exclusive jurisdiction. An adjudicated claim cannot again be brought under review in any judicial tribunal. An amount once fixed is a final ascertainment of the damages or injury."*

Without enumerating all our treaties of this kind with Great Britain, it is sufficient to refer to those made in 1822, 1853 and 1863, each of which contained the most solemn stipulations for the finality and conclusiveness of the awards, and the most distinct and positive engagement to give full effect to the decisions of the commissioners or the umpire, as the case might be, "without any objection, evasion or delay whatsoever." With France we have made similar treaties, the most recent of which is the convention of January 15, 1880, negotiated by Secretary Evarts under the direction of President Hayes, and containing the following stipulations:

"The concurring decisions of the Commissioners, or any two of them, shall be conclusive and final. . . . The High Contracting Parties hereby engage to consider the decisions of the Commissioners, or any two of them, as absolutely final and conclusive upon each claim decided upon by them, and to give full effect to such decisions without any objections, evasions or delay whatever."

With Peru, in 1862, again in 1863, and again in 1868, the United States concluded similar treaties, in all of which the possibility of any dissent or appeal from the decisions of the commissioners was expressly precluded, and in the last of which the provision for this purpose was in the identical language employed in the treaty with Mexico which was concluded in the same year. With Equador, in 1862, we made a similar treaty, in which it was stipulated that "The proceedings of the commissioners shall be final and conclusive with respect to all pending claims."

* Comegys *v.* Vance, 1st Peters, 193–212.

The reader will now note the date of a convention between the United States and the Republic of Hayti, by which the claims of citizens of the United States for indemnity for acts against person and property, alleged to have been done by Haytian authorities, were submitted to the final arbitrament and award of Mr. Justice Strong, a retired Justice of the Supreme Court of the United States. This convention bears the signature of Mr. Frelinghuysen, as Secretary of State. It was concluded May 24, 1884, and it contains the following covenant:

"The High Contracting Parties will pay equally the expenses of the arbitration hereby provided; and they agree to accept the decision of the said arbitrator, in each of said cases, as final and binding, and to give to such decision full effect and force, in good faith, and without any unnecessary delay, or any reservation or evasion whatsoever."

Mexico, from the contiguity of its territory with the territory of the United States, from the frequent revolutions in its government, and from the lawlessness which has sometimes prevailed on both sides of a long frontier, has been a country between which and the United States there has from time to time been an accumulation of claims of citizens of each country upon the government of the other, for wrongs done to person or property, which were fit subjects of reclamation. In 1839 there was an accumulation of such claims asserted by the citizens of the United States against Mexico; and in that year a treaty was concluded for the appointmens of commissioners to adjudicate them. The treaty contained this provision:

"The said Commissioners shall, by a report under their hands and seals, decide upon the justice of the said claims, and the amount of compensation, if any, due from the Mexican government in each case. . . . And the contracting parties further engage to consider the decision of such umpire to be final and conclusive on all the matters so referred."

Prior to the year 1868, there was another accumulation of

such claims asserted by citizens of each of the two republics against the Government of the other. To provide for the final and complete adjudication of all these claims, a treaty was concluded between the United States and Mexico, on the 4th of July, 1868. It established a board of two commissioners and an umpire, to whose final decision the evidence for and against every claim was to be submitted, in case of a disagreement between the commissioners. The umpire selected was Sir Edward Thornton, then British minister to the United States. It was stipulated in the treaty that if the aggregate of all the claims allowed on the one side should exceed the aggregate of all the claims allowed on the other side, the balance should be paid by the government against which it so resulted to the other government, in equal installments, until the whole balance had been paid. The government receiving the balance undertook to make distribution *pro rata* to the claimants in whose favor awards had been made. The aggregate of the claims adjudicated in favor of citizens of the United States far exceeded the aggregate of the claims adjudicated in favor of citizens of Mexico; and the government of Mexico began to make payment of the installments into the State Department of the United States in January, 1879, and down to and including the year 1881, five of these installments had been so paid. Four other installments were also paid to the State Department in 1882, 1883, 1884 and 1885. The five first installments have been distributed to all the claimants in whose favor awards were made by the commissioners or the umpire; but their shares of the remaining four installments have not been distributed to the two claimants hereafter to be mentioned, although the money now lies in the State Department. The circumstances which have been allowed to frustrate the execution of the treaty, notwithstanding its solemn stipulations which will

presently be quoted, are now to be stated. This treaty was concluded by General Grant as President of the United States, and was negotiated by Mr. Fish, as Secretary of State.

Among the cases on which the commissioners failed to agree, and which went to the umpire for his decision, there were two claims in which the sums awarded by the umpire were probably the largest of any of the awards. One of these was a claim asserted by Benjamin Weil, a citizen of the United States, for the value of a large lot of cotton alleged to have been seized and appropriated by Mexican authorities, in Mexican territory. The other was a claim asserted by "La Abra Silver Mining Company," a private corporation established under laws of the State of New York, and composed of respectable citizens of New York and Missouri. The claim of this company was for the value of a silver mine which they had purchased from the government of Mexico, and paid for; for the amount of their expenditure in machinery, etc., and for the value of the ore which they had taken out, and which lay upon the ground, when their agents and servants were driven away from the property, by certain tumultuary proceedings of the Mexicans, for which they claimed that the local authorities were responsible. These two cases, that of Weil and that of La Abra Company, were in litigation before the commissioners and the umpire for the space of six years. In the Weil case the whole question related to his title to the cotton and its value; there was and could be nothing else in controversy. In the case of La Abra Company, the whole question related to their title to the mine, the facts which made the Mexican authorities responsible for the loss of the property, and the damages, if any, which should be awarded to them. In the Weil case, the umpire, after full consideration and examination of all evidence on both sides, made an award in Weil's favor of the

sum of $285,000, as the value of his cotton, with interest from September 20, 1864, which made the whole award $487,810.68.

In La Abra case the umpire awarded for the value of the ore which the company had mined, and for the machinery and improvements. The amounts which he fixed for these two items, with interest added, made the whole award $683,000. The value of the mine, as the evidence of the company tended to show, was more than four times the amount awarded. But for this value the umpire awarded nothing. In both cases there was a great amount of evidence for and against the claims, taken chiefly in Mexico and before Mexican authorities, and very thoroughly canvassed by the counsel for the United States and the counsel for Mexico. All of this evidence, by the terms of the treaty, was submitted and the cases were fully argued before him. As will be seen hereafter, the terms of the treaty made the decisions of the umpire final and conclusive.

The award in favor of Weil was made by the umpire on the 1st of October, 1875; that in favor of La Abra Company was made by the umpire on the 27th of December, 1875. After the umpire had made the Weil award, the agent of Mexico made a motion before the umpire for a rehearing, on what he alleged to be newly-discovered evidence. The Mexican minister at Washington had met there a person who professed to have known Weil on the Rio Grande in 1864, and who told the minister that Weil's claim was an unmitigated fraud. With the aid of this person the Mexican government gathered what it claimed to be important documentary evidence, showing fraud and perjury on the part of Weil and his witnesses. On or about September 19, 1876, this evidence, so obtained, was laid before the umpire, with an argument for a rehearing. On the 20th of October, 1876,

Sir Edward Thornton decided that, according to the terms of the treaty, he could not take this evidence into consideration, as it had not been submitted to the commissioners.

Encouraged by the information given to it by the person above referred to, in respect to Weil's claim, and as there is reason to believe under an agreement to give this person 50 per cent. on the amounts that he could finally save to the Mexican government by defeating both of these awards, that government proceeded to gather proofs to show that the La Abra claim was also a fraud, a deliberate conspiracy to rob the Mexican treasury, by forgery of documents, perjury, etc., etc. This alleged new evidence, obtained under circumstances which made it liable to great suspicion—a suspicion which the adjudicated cases and all the best writers attach to such subsequent proofs of fraud as means of unsettling a final adjudication—was laid before President Hayes, after an act of Congress had been passed (June 18, 1878), requesting the President to investigate these two awards. Such an investigation was made by Mr. Evarts as Secretary of State, and he reported to the President that there was no reason for setting aside the awards and granting new trials. Thereupon President Hayes directed the distribution to these two claimants of their shares of the fourth installment which had been paid in by Mexico. In like manner their shares of the fifth installment were distributed to them under President Garfield. But on the accession of President Arthur and Secretary Frelinghuysen the representatives of Mexico made a new effort and backed it by new influences. The alleged new evidence which was to overthrow these awards had been received from the Mexican legation and filed in the State Department under the seal of diplomatic secrecy. The claimants and their representatives were not allowed to inspect it or to have copies of it. A new convention was negotiated

and signed by Secretary Frelinghuysen and M. Romero, the Mexican Minister at Washington, agreeing to set aside these two awards as to all the undistributed and the unpaid installments, and to have new trials of the claims. President Arthur sent this new convention into the Senate on the 20th of July, 1882, and along with it went into the secret archives of the Senate the alleged new proofs which were to convict American citizens of fraud and perjury, and to deprive them of adjudications expressly made final and conclusive by the supreme law of the land; adjudications rendered upon the very same questions which are now proposed to be tried over again. From the nature and form of the Senate's proceedings when deliberating upon a treaty, individuals, whatever may be their rights, are not allowed to be heard in person or by counsel on anything that is alleged against them. The proceeding, no matter whose interests are involved, is conducted in what is called "an executive session," which means with closed doors. As a tribunal to try and determine a question of fraud, affecting the rights and characters of citizens of the United States, the Senate is an exception to every other public body in this country. Senators cannot disclose to the parties concerned what is urged against them.

It is now needful to place side by side the important provisions of the treaty of July 4, 1868, and those of the new convention, which, if it shall obtain a two-thirds vote in the Senate, will overturn the whole system of international arbitrations for the settlement of individual claims against foreign powers, because it will thereafter be made impracticable for the United States ever to make another treaty of this description with any respectable government, for any useful and beneficial purpose.

TREATY OF JULY 4, 1868, BETWEEN THE UNITED STATES AND MEXICO.

The President of the United States and the President of the Mexican Republic hereby solemnly and sincerely engage to consider the decision of the commissioners conjointly, or of the umpire, as the case may be, *as absolutely final and conclusive upon each claim decided by them or him, and to give full effect to such decisions, without any objection, evasion, or delay whatsoever.* . . . The High Contracting Parties agree to consider the proceedings of the commissioners as a full, perfect and final settlement of every claim upon either government, arising out of any transaction of a date prior to the exchange of ratifications of this convention; and further engage that every such claim, whether or not the same may have been presented to the notice of, or made, preferred, or laid before the said commission, *shall, from and after the proceedings of the said commission, be considered and treated as finally settled, barred and henceforth inadmissible.*

CONVENTION OF JULY 13, 1882, BETWEEN THE UNITED STATES AND MEXICO, NOW PENDING IN THE SENATE.

[After a Preamble.]

The President of the United States, after considering the circumstances of the case, and in view of the statute hereinbefore made (June 18, 1878), being of opinion that the cases of Benjamin Weil and La Abra Silver Mining Company should each be reopened and retried, the President of the United States of America and the president of the United States of Mexico have resolved to conclude a convention for that purpose. . . . The findings of the commission on said claims of Benjamin Weil and La Abra Silver Mining Company, numbered 447 and 489 on the American docket of the commission under the convention of July 4, 1868, between the high contracting parties, *are hereby set aside* as to installments not paid by Mexico before January 31, 1882, and it is agreed that there may be a reopening of each of these cases in the manner provided, as to the remainder of said claims paid or yet remaining unpaid on the 31st of January, 1882. . . . The rehearing refers only to the installment which was paid on the 31st of January last, and to those installments which may be hereafter paid. Mexico charges that the said claims as presented before the commission were wholly based upon fraud. . . .

Notwithstanding all the traditions of our diplomacy, notwithstanding the force of previous treaties, notwithstanding the force of the treaty of July 4, 1868, with Mexico, notwithstanding two most emphatic previous admissions by our State Department of the binding character of international adjudications, a new light broke upon the official mind in 1882, and afterward appears to have gone out in 1884. In 1882 the new light disclosed a supposed principle by which the finality and conclusiveness of an adjudication could be made to mean only a qualified and temporary finality, binding so long as the sovereign parties should choose to let it stand, and no longer; that an "absolute" finality, however "solemnly and sincerely" stipulated, did not mean what it said. In 1884 the same Secretary of State thought it worth while, in a convention with Hayti, to repeat this formula of final and conclusive force. Perhaps it was conjectured that without it the services of such an arbitrator as an ex-Justice of the Supreme Court of the United States could not be obtained. Whether in 1882 our Government had something to gain from Mexico, or persons whom our administration wished to aid had something to gain from Mexico or her rulers, which it was supposed might be facilitated by allowing her to have these awards set aside, it is certain that this extraordinary concession was made to her, so far as a President and a Secretary of State could make it. It is now for our Senate, the other branch of our diplomatic power, to determine whether it can allow this affair to be consummated, without crippling the present and every future administration, by taking away the only means by which such international arbitrations can be made of any value, or can be entered into for any practical purpose. For, it is perfectly plain that if this precedent shall be established, no Secretary of State can thereafter conduct his department with any satisfaction to himself or to the

country, in these matters of individual claims on foreign powers. If, after there has been inserted in a convention the long-standing and essential clause providing for the finality and conclusiveness of the adjudications, the foreign government is to be at liberty, years afterward, to come forward and claim a new trial on the ground that the tribunal was imposed upon by fraudulent testimony, the entire system of such arbitrations will be rendered futile. What citizen of the United States would ask the State Department to prosecute for him a claim before an international tribunal, if the foreign government were not to be bound in the usual manner to accept and perform the award? What foreigner would ask his sovereign to submit his claim against the United States to the arbitrament of an international tribunal, if his government were not able to tell him that the United States would be precluded from ever questioning the decision on account of anything but misconduct in the tribunal itself? The truth is, and it must be reiterated until public men understand it and feel its force, that the diplomatic department of our Government cannot depart from the settled principles of jurisprudence—our own jurisprudence as well as that of all civilized States—in regard to the decisions of all tribunals of exclusive and final jurisdiction, without doing immense mischief. The plea that the diplomatic department can make any agreement with a foreign nation that it chooses to make, amounts only to this—that it has the physical power to make it, because there is no authority which can prevent it. Its moral right to make an agreement which violates the rights of its own citizens and injures itself, is an entirely different question. And therefore it is important to set forth in this paper, with the utmost distinctness, what kinds and circumstances of fraud—fraud on whose part and by whose action—a final adjudication can be disturbed. For, it is the

merest chimera to suppose that there can by any possibility be invented any court of appeal to which the decisions of international tribunals, made by the terms of a treaty final and conclusive, can ever be carried for revision. ' The real value of such international courts is that they are at once tribunals of the first and of the last resort. It is because they are so, invariably, that they promote and secure the peace of nations. If they were not so there could be no end to the controversies which they are appointed to close. If the very eminent tribunal which sat at Geneva had not been an international tribunal of the first and the last resort, war between Great Britain and the United States would inevitably have ensued.

If it is said that although there can be no appeal to another tribunal to revise the decision of the first one, there may in a particular case be an appeal by one of the sovereign parties to the other to make a special agreement, setting aside an award, the answer is that if the sovereign parties depart from the settled doctrines of jurisprudence and agree to make a cause for setting aside an award, something which those principles do not recognize, and which for the most important reasons those principles have rejected, the diplomatic and the judicial departments will act upon contradictory rules, and everything will be in confusion. Until now our diplomatic department and our judiciary have acted in these matters upon the same principles, as will presently appear.

Secretary Frelinghuysen is no longer living, and one would not willingly do injustice to a public man who cannot now explain his official course. It is but fair to suppose that he was unfamiliar with the limitations upon the specious maxim that "fraud vitiates everything;" that he overlooked certain records in his own department which show that two of his predecessors have most pointedly affirmed the binding and

conclusive force of awards made by international tribunals of arbitration; and that he did not foresee the consequences to the whole system of such arbitrations which would ensue from the precedent which he allowed the Mexican government to endeavor to establish. It seems strange, however, that he did not refer the Mexican Minister to the settled doctrines of our jurisprudence, and to the uniform principles laid down by the most eminent text-writers on international law, which preclude any attack upon a decision of an international tribunal for any supposed fraud except fraud on the part of the tribunal itself. The case before him called for a direct observance of this distinction, because Mexico has never claimed that the very eminent and competent umpire had not acted in these cases with the utmost fairness, and just as the evidence before him required him to act. The whole contention was and is that the umpire had been imposed upon by perjury and forgery, or, in other words, that the awards had been *procured* by fraud, and not that it was a fraud to have made them. The cases were absolutely clean and clear of all the grounds for impeaching awards which are recognized by the settled rules of both municipal and international law.

There is a long line of judicial decisions of the highest authority, with all of which I shall not encumber my pages by citing the cases, but which establish the distinction above stated. I content myself with stating the substance of the leading cases, which are familiar to most well-read lawyers. In the case of *Comegys vs. Vance*, already referred to, the Supreme Court of the United States put the awards of international tribunals on the same footing with the judgments of municipal courts, and declared that the judiciary will not allow the decision of a competent tribunal of exclusive jurisdiction to be again examined. It had formerly been a vexed

question what kinds or circumstances of fraud would justify courts in allowing the judgments of competent tribunals to be impeached by the party against whom they had been rendered. Treating of the judgments of established courts of exclusive jurisdiction, Chief-Justice Shaw, of Massachusetts, one of the greatest judicial magistrates this country has produced, laid down the doctrine respecting fraud in the following clear and forcible language:

"The maxim that fraud vitiates every proceeding must be taken, like other general maxims, to apply to cases where proof of fraud is admissible. But where the same matter has been actually tried, or was so in issue that it might have been tried, it is not again admissible; the party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be contradicted." (2 Gray, 351.)

Citing this doctrine with entire approbation the Supreme Court of the United States, speaking through Mr. Justice Miller, in the case of the *United States vs. Throckmorton*, laid down the law in the very same way, and with still greater amplitude of illustration.* The opinion of Justice Miller, concurred in by all the judges, enumerated every ground on which a final decision of a competent tribunal of exclusive jurisdiction can be allowed to be subsequently called in question, and distinctly excluded from those grounds all consideration of such alleged frauds as those which have been brought forward to defeat these two awards.

The learned Justice said:

"The mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases. . . . There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two

* 98 U. S. R. 61.

which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely, *Interest reipublicæ, ut sit finis litium*, and *Nemo debet bis vexari pro una et eadem causa*."

The most eminent text-writers on international law affirm the same principles in relation to the decisions of international tribunals. It is only necessary to quote from Vattel and Twiss. Vattel observes:

"If then their sentence be confined within these bounds [the question submitted] the disputants must acquiesce in it. They cannot say that it is manifestly unjust, since it is pronounced on a question which they have themselves rendered doubtful by the discordance of their claims, and which has been referred, as such, to the decision of the arbitrators. Before they can proceed to evade such a sentence they should prove by incontestable facts that it was the offspring of corruption or flagrant partiality."

Professor Twiss says:

"When nations have agreed to refer any question in dispute between them to arbitrators, their good faith is pledged to abide by the decision of the arbitrators, unless the decision should involve clear departure from the terms of the reference, or should be in conflict with the rules of justice, and, therefore incapable of being the subject of a valid international compact, or should be the manifest result of fraud and collusion with one of the parties."

Our own text-writer, Halleck, expresses the same rule in the following terms:

"If the contending parties have agreed to abide by the decision of the referees, they are bound to do so, except in cases where the award is obtained by collusion, or is not confined within the terms of the submission."

Corruption, then, on the part of the tribunal itself or its collusion with one of the parties, or its gross partiality, or its assumption of jurisdiction beyond the terms of the submission, will alone justify any reopening of a judgment rendered by a court of exclusive jurisdiction, or a decision of an arbitrator, whether private or international. The chief reason why a supposed fraud on the part of the successful party, or perjury subsequently charged upon his witnesses, cannot be considered, is that to allow it would open the door and furnish

the temptation for the manufacture of subsequent proofs. Every one who has had much experience in litigations, knows that almost universally the losing party complains that his adversary's witnesses have committed perjury. Give him an opportunity to prove their perjury after he has had his day in court and after the verdict, and you create an enormous temptation to get rid of the verdict by fraudulent pretense of a fraud. Private individuals, however, have much less power than governments to get up such pretended frauds, and therefore the rule that excludes such attempts should be most strictly applied to governments. All governments, in any matter in which there is much money at stake, are liable to be approached by very unscrupulous persons. A governernment has only to say to a person who professes to know that it has been defrauded, "bring us proof of the fraud and we will reward you handsomely." The higher officials need not concern themselves with the means that will be employed. Any quantity of proofs will be forthcoming, and they will often be curiously and nicely adapted to the requirements of the case. The stimulus of a great contingent compensation will do all that is needed to make a case which can be claimed as amounting to demonstration of the supposed fraud. When to this is added the fact that the government thus obtaining proof of what it charges to have been fraud in procuring an award is not obliged to subject that proof to scrutiny in a court of justice, as an individual would have to do, but may deal with it diplomatically and under the seal of diplomatic secrecy, and a situation is created in which the grossest villainy may be perpetrated, and no one will be responsible.

Finally, there remain to be cited two precedents in the State Department, which Secretary Frelinghuysen must have overlooked, and which entirely negative, for the diplomatic department itself, the possibility of disturbing an award made by an international tribunal of arbitration, for any such cause

as that which Mr. Frelinghuysen adopted as the basis of his agreement with Mexico, contained in the convention now pending in the Senate.

Secretary Seward, in a note addressed to the government of Venezuela on the 3d of March, 1869, said:

"International tribunals for the adjudication of private claims are created by governments in no expectation that they are to escape that possible admixture of error which is inseparable from all human institutions. They are resorted to because the governments concerned have either actually experienced or have been forced to anticipate, the impracticability of their coming to an agreement upon the merits of such claims and upon the methods of investigating them. However imperfect the experiment may prove, it is adopted in view of the dread alternative in comparison with which a practical failnre to accomplish exact justice falls into insignificance. First among the great powers to introduce this beneficent mode of achieving the peaceful termination of international controversies, it is not for the United States to do or suffer aught that can impair its efficiency. The deliberations and judgments of a commissioner would be fruitless, if they only started questions for renewed discussion. They must be final or they must be nothing."

Secretary Evarts, who thought that we had grave reason to complain of the "Halifax award," by which two of the commissioners awarded to Great Britain $5,500,000 in gold, as damages for invasion of her fishery rights, while the American Commissioner found that nothing was due, submitted to the British Government an argument of great force alleging certain objections to this award, one of which was its "extravagance." The Marquis of Salisbury, British Foreign Secretary, in a dispatch dated November 7, 1878, answered Mr. Evarts, that the peace of the world demanded that such adjudications should be final; that the tribunal had fairly heard and considered the whole case, and that the litigants could not dispute the decision. "To argue," he said, "against the validity of the award solely on the ground that the conclusion arrived at by the arbitrators is erroneous, is in effect the same thing as to dispute the judgment which they have formed on the evidence." Mr. Evarts, on mature

and deliberate consideration, yielded the point, and our Minister at London, on the 21st of November, 1878, was instructed to give notice that the award would be paid. This instruction was conveyed in the following language:

"I am instructed by the President to say that such payment is made on the ground that the Government of the United States desires to place the maintenance of good faith and the security and value of arbitrations between nations above all question, in its relations with Her Britannic Majesty's government, as with all other governments."

With these precedents graven on the records of the State Department, how is it possible to justify the pending convention with Mexico, by which, if it is approved by the Senate, that government will be allowed to have these awards set aside, and to subject the claimants to new trials?

It remains to add one other occurrence to the extraordinary history of these cases. Mr. Frelinghuysen refused to distribute to these two claimants the amount of the sixth installment which had been paid in by Mexico on the 31st of January, 1882. Thereupon the claimants applied for a writ of mandamus to compel the Secretary of State to make this distribution. The Supreme Court of the United States decided that the President had power to make the new convention with Mexico, agreeing to set aside these awards and providing for new trials of the claims, and that the court would not interfere while the convention was pending in the Senate. Of course the court did not say or intimate that the Senate ought to approve of the new convention. The court is no part of the diplomatic or treaty-making power, and the approval of the convention by the Senate is a pure question of high public policy. Chief-Justice Waite was very careful to say that the court expressed no opinion on the merits of the controversy between Mexico and the claimants.

In making the application to the court for the mandamus,

the claimants contended that an award made by an international tribunal of arbitration in favor of a citizen of the United States and against a foreign government establishes an absolute right of property, of which the citizen cannot be deprived without due process of law, and that an agreement made by the diplomatic power with the party who is bound to pay the money, by which that party is released from the award, is not due process of law, and cannot be justified under our Constitution. If the decision of the court seems to negative this contention, it does so to just this extent—that as a question of naked power the President and the Senate, acting together, can make such an agreement. But this leaves the propriety and the public policy of such an agreement, made in reference to an award rendered under such a treaty as that of July 4, 1868, just where they were. It brings the Senate face to face with the most important question that has ever arisen in regard to international arbitrations of this kind; for the Senate has to decide whether it can allow an adjudication, made after full hearing of the claim, made with the utmost fairness, and on the very question of the integrity of the claim, to be set aside, without destroying the principles which render such arbitrations of any value. What is to take the place of these arbitrations? It is too absurd, in ordinary cases, to think of resorting to war, or even to reprisals, because a foreign government does not admit that a citizen of the United States has a valid claim against it. This age of the world is too far advanced in civilization for that kind of action, save in the most exceptional cases. Nations have found out that there is a good substitute for it. That substitute is the judgment and decision of an impartial arbitrator, whose awards both parties have expressly bound themselves to accept. Establish the principle that an express and solemn covenant to abide by his decision means nothing, and there will be no more of such arbitrations entered into.

Moreover, new trials and further arbitrations of the very same matter that has once been fully tried and determined will not end the controversy. Charges of fraud and perjury can be made by either party, *toties quoties*, just as often as the case is retried. In these particular cases new trials, taking place more than ten years after the original adjudications, can never be anything but a mockery of justice, as in such an interval of time the claimants must have lost a great deal of testimony which would have rebutted the proofs which agents of Mexico have been secretly preparing for years.

These cases would not have called for public discussion were it not that this is the first time in our diplomatic history that an attempt has been made to overthrow the conclusive character of adjudications made under a treaty which stipulated in the most solemn manner that both the sovereign parties would abide by the decision without any objection, evasion or delay whatsoever. It is but reasonable to suppose that the good sense and firmness of the American Senate will adhere to the principles laid down by Secretaries Seward and Evarts, rather than to the unwise and ill-considered experiment of Mr. Frelinghuysen.

Every one who has followed me through the analysis of the principles decided by the adjudicated cases will perceive that they do not depend upon or involve any technical rules of pleading, when they assert that in all courts of justice the final decision of other courts of exclusive jurisdiction over the subject of a controversy must be held to be really and truly final. They are so held upon considerations of public policy, and not because of any technical forms of averment or answer. Still less is there anything technical in those rules of international law which make international adjudications final, conclusive and binding; because if they are not so, as Mr. Seward most forcibly said, the only thing that can be done is to fall back upon the dread alternative of a resort to some kind of compulsion.

If we act with reasonable consistency, and do not suffer any impairment of the principles of international law, it is not at all visionary to look forward to a time when the leading nations of the world may establish a permanent international commission for the trial and adjudication of all claims of a pecuniary nature which the citizens or subjects of one country can have upon the government of another. Constituted by England, France, Russia, Germany, Spain, Italy, and the United States, and composed of one commissioner appointed by each of the governments, such a tribunal could sit, on notice, at the capital of either country, and it would seldom be without business to transact. In progress of time, other countries would become parties to the arrangement, if it proved successful. It would soon become an institution of great utility, if the arrangements for it were made in accordance with the dignity of the powers by which it might be established. But if the present system of special and occasional arbitration between two governments is to suffer such an injury as is now threatened, no enlargement of it into a permanent tribunal will ever be practicable.

There are some fastidious persons, who affect to think it beneath the dignity of our State Department to become what they are pleased to call a "claim agency." They forget that the State Department, in this matter of prosecuting the claims of our citizens on foreign governments, which are fit subjects of reclamation, cannot absolve itself from certain duties, consistently with what is unquestionably one of its proper functions. When the States of this Union surrendered to the Federal Government the whole of their sovereign rights to protect their own citizens, in matters of tort or contract, against the injustice of foreign powers, they clothed the Federal Government with a sacred trust and imposed upon it a high constitutional duty.

GEORGE TICKNOR CURTIS.